Latin America needs unity on data protection

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Published in:
Privacy Laws and Business

Publication date:
2003

Document Version
Publisher's PDF, also known as Version of record

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The Mercosur (Southern Common Market) was set up to facilitate trade within the Latin American region. But, says **María Verónica Pérez Asinari**, the lack of harmonised data protection laws could prove to be a problem for the free flow of personal data between Mercosur countries and with the European Union.

The Mercosur (Southern Common Market) is an integrated institution that was established in 1991 by the Treaty of Asunción. It consists of four member states - Argentina, Brazil, Paraguay and Uruguay. Bolivia and Chile are listed as associated members, but they do not participate in the decision making process. The Doctrine notes that the Mercosur can be considered - taking into account its evolution experienced until now - an incomplete Customs Union. The intention to continue developing a common market across Latin America is not only present in the letter of the legal instruments, but for the time being, appears to have political backing. The Mercosur is an intergovernmental system without any delegation of sovereignty into a supranational organisation, as in the case of the EU.

The Mercosur has not yet regulated data protection, so in order to assess the level of protection across the region, we need to study the domestic laws of individual Mercosur countries.

One important development in Latin American data protection occurred last year after the Ambassador for the Republic of Argentina requested a decision from the European Union on the adequacy of his country's data protection laws. In October 2002, the Article 29 Data Protection Working Party responded to his request by issuing a favourable opinion (see notes) which states that Argentina does provide an adequate level of protection within the context of Article 25(6) of the EU Data Protection Directive (which refers to data transfers outside the European Union). However, Argentina is not yet officially recognised by the EU as providing adequate protection.

How could this potential adequacy decision affect personal data flows within the Mercosur? Do Mercosur countries have a legal data protection regime that could be considered "adequate" compared with the European Union one? Does the Mercosur need legislative harmonisation in order to facilitate data exchanges, not only between its member countries, but also with EU member states? Could legislative harmonisation also be convenient for the Mercosur in the context of the Free Trade Area of the Americas (FTAA) (www.ftaa-alca.org) negotiations which cover areas that have personal data protection implications (for example e-commerce, and general consumer trade)?

> Development of the Mercosur Common Market would be facilitated if harmonisation of personal data protection rules could be achieved.

PRIVACY LAWS IN THE MERCOSUR MEMBER STATES

Many Latin American countries generally regulate data protection through a legal concept called *Habeas Data*. This is a special judicial remedy for the protection of personal data which is normally addressed through member states' national constitutions. In addition to *Habeas Data*, Mercosur member states have ratified the American Convention on Human Rights, the "Pact of San José, Costa Rica", which includes a provision on the protection of private life in Article 11. Listed below are some of the individual legislative approaches taken by Mercosur member states.

ARGENTINA

Argentina regulates personal data protection by different legal norms: the Constitution, the Personal Data Protection Act (No. 25.326) and the Regulation approved by Decree No. 1558/2001. In October last year, the Article 29 Working Party published its opinion on Argentina's data protection regime. It based its opinion on its 1998 position paper which relates to third country data transfers (see notes). The comparative law method used by the Working Party led them to look also at the interpretation made by judicial decisions in order to clarify certain issues, like the scope of application of the law. The conclusion of the Working Party was favourable in terms of the adequacy of the Argentinean legal framework as compared to the European Union framework.

BRAZIL

Habeas Data is addressed in Article 5 of Brazil's 1998 Constitution, stating that *Habeas Data* shall be granted:

> a) to gain access to the information related to the individual, contained in records or data banks of government agencies or of agencies of a public character; and
>
> b) for the correction of data when the individual making the request does not prefer to do so through a confidential process, either judicial or administrative (this provision has to be complemented by other rules contained in Article 5 of the constitution).

Act No. 9507/97 regulates the right of access and rectification of personal data, and also establishes the procedural aspects for the *Habeas Data* remedy. The act does not regulate certain principles such as restrictions on onward transfers, limitations on the purposes for processing data, transparency etc. However, there are also certain sector specific laws that could complement the regulation. For example, data protection is addressed in the 1997 Telecommunications Act (No. 9472/1997), the 1996 law on wiretapping (No. 9296/1996), and the 1990 Code of Consumer Protection and Defence. In addition, Article 2 of the 1984 Act on Information Technology (No. 8078/1990) has references to data security.

PARAGUAY

Article 135 of the National Constitution of 1992 regulates *Habeas Data* as follows:

> "Everyone may have access to information and data available on himself or assets in official or private registries of a public nature. He is also entitled to know how the information is being used and for what purpose. He may request a competent judge to order the updating, rectification, or destruction of these entries if they are wrong or if they are illegitimately affecting his rights." [unofficial translation]

In 2001, the Paraguayan Parliament passed an act regulating the information of private character (Act No. 1682/2001) which contains provisions on data quality, rights of access and rectification, sanctions for violations to the rules, prohibitions on publicising and divulging sensitive data, etc. However, the act lacks regulations on purpose limitation, security, restrictions on onward transfers, etc.

URUGUAY

Uruguay is the only Mercosur country in which the Constitution does not regulate *Habeas Data*. However, the Constitution has a general norm in Article 7 which provides individuals with the right to protect their life, honour, freedom, security, job, and property. Article 72 determines that the list of rights, duties and guarantees does not exclude other rights that are inherent to individuals, or derived from the republican form of government. So, although data protection is not explicitly referred to in the Constitution, individuals' rights could potentially be protected through the use of this article.

The Acción de Amparo is a constitutional remedy designed to protect rights, implicitly or explicitly, recognised by the Constitution (it has been regulated by the Act No. 16.011/88). Furthermore, Uruguay has certain sector-specific laws regulating data protection issues, for example, in areas such as the National Statistics System, medical data, secrecy of financial data etc. There are also certain draft laws on data protection being considered by the Parliament.

CONCLUSION

Argentinean data protection law prohibits trans-border data flows to countries that do not provide adequate protection for personal data (Article 12, Act No. 25.326). This rule was one of the points considered by the Article 29 Data Protection Working Party in its assessment of the adequacy of Argentina's data protection laws. In principle, therefore, not only would the act restrict data transfers within the Mercosur, but the prohibition would also be reinforced by a future adequacy finding decision from the European Union.

From the brief reference to Mercosur countries' data protection legal frameworks outlined above, one could infer that there are some disparities between the laws that could lead us, in principle, to question the level of adequacy they provide vis-à-vis Argentinean or EU data protection laws. However, we should point out that reference has been made only to legislative sources, while other sources that could complement any adequacy assessment (as specified in Article 12(4-5) of Argentina's data protection law, and Article 25(2) of the EU directive) have not been considered.

It is clear that the development of the Mercosur Common Market would be facilitated if harmonisation of personal data protection rules could be achieved. And, of course, this scenario would obviously be beneficial with regard to data exchanges between the Mercosur and the European Union, as well as being in line with what has been established by the Inter-regional Cooperation Framework Agreement between the European Community and the Mercosur (signed in Madrid, December 15th 1995).

Finally, and as a consequence of what has been expressed in the paragraph above, a Mercosur common position on the subject matter should be strengthened in order to facilitate negotiations for the creation of the Free Trade Area of the Americas on the issues which present personal data protection implications.

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ARTICLE: This article is an edited version of a paper entitled: *The Mercosur and the Adequacy of Argentinean Personal Data Protection Regime. Should a Solution at Regional Level be found?*

DATA PROTECTION IN LATIN AMERICA: For details on the structure of the Mercosur, see: *Have you ever wondered what is the Mercosur?* by A Molinari and M V Pérez Asinari, European Stagiaire Journal, January 2001.
Article 29 Working Party opinions - http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/
For information on the Mercosur-EU relationship: http://europa.eu.int/comm/external_relations/mercosur/intro/index.htm
Additional information on the Mercosur: www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp
Details on *Habeas Data:* http://elj.warwick.ac.uk/jilt/00-2/guadamuz.html#3.2